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Supreme Court
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 546

CITY OF MERIDIAN
APPELLANT

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

STATEMENT AS TO JURISDICTION

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LIST OF CASES CITED AS AUTHORITY FOR THE PROPOSITION THAT THE QUESTIONS PRESENTED ARE SUBSTANTIAL

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Hodges v. Western Union Telegraph Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770

Memphis v. Postal Telegraph and Cable Company, 145 Fed. 602 (Circuit Court's Opinion) 139 Fed. 707 (District Court's Opinion)

Russell v. Sebastian, 233 U. S. 195

St. Louis v. Western Union Telegraph Co., 149 U. S. 465

Southern Telegraph Company v. A. G. S. Railroad Co. 1 Miss. Dec. Hemmingway & McDonald 489

LIST OF CASES CITED AS AUTHORITY FOR THE PROPOSITION THAT THIS COURT HAS JURISDICTION

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City of Detroit v. Murray Corporation, 355 U. S. 489, 2 L. Ed. 2d 441, 78 S. Ct. 458

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STATEMENT AS TO JURISDICTION

The Appellant, pursuant to United State Supreme Court Rules 13(2) and 15, file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the final judgment rendered by the United States Court of Appeals for the Fifth Circuit affirming the judgement of the United States District Court for the Southern District of Mississippi, granting the relief prayed by Appellee as plaintiff in said Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was rendered on June 9, 1958, and is reported in 256 F. 2d at page 83, and a copy thereof is appended hereto (appendix p. 1.), pursuant to Rule 15 (1) and (h). The opinion of the United States District Court for the Southern District of Mississippi was filed on September 6, 1957, and is re-

ported in 154 F. Supp. at page 736, and a copy thereof is appended hereto: (Appendix p. 13) The judgment of the District Court is set out in Note 1 of the opinion of the Court of Appeals. No finding of fact or conclusion of law was made by either court separate from the reported opinion.

JURISDICTION

The appeal to the Court of Appeals was by Appellant here from a judgment entered in the United States District Court for the Southern District of Mississippi on September 16, 1957. The judgment in the District Court was rendered in an action by Appellee against Appellant under 28 U. S. C., 2201. Appellee sought and obtained a declaratory judgment that Appellant was not entitled to collect from Appellee the charges authorized by Section 5 (3) of Chapter 372 of the Laws of 1956 (Mississippi Code of 1942 Recompiled, Section 7716-05 (e)). Appellee claimed in the Courts below that the statute referred to was invalid as against it because of the limitations imposed by Article I, Section 10 (Contracts Clause) and Amendment 14 (Due Process Clause) of the Constitution of the United States.

The pertinent parts of the statute of the State of Mississippi held to be unenforceable by Appellee as against Appellant are as follows:

Section 7716-05 (e), Mississippi Code of 1942, Revised:

"(e) In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operat-

ed under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two percent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in Section 1 D (1) and 1 D (2) (§7716-01) and *in the case of a utility defined in 1 D (3) (§7716-01) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not*, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the cooperative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality."

(Emphasis indicates portion of said law imposing charge on Appellee)

The definition referred to in the above quoted subsection pertinent here is Section 7716-01 D (3), which reads as follows:

"D. The term 'public utility' when used in this act, includes persons and corporation, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

* * * *

(3) The transmission, conveyance or reception of any messages over wire or by radio or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation, . . . "

The appeal herein is from the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 9, 1958; as to which petitions for rehearing were filed on June 27, 1958, and within the time allowed therefor by Rule 29 of the Rules of the United States Court of Appeals for the Fifth Circuit; which petitions for rehearing were not overruled until August 4, 1958, so that said judgment of June 9 did not become effective until the latter date. Notice of Appeal to this Court was served on Appellee and filed in the Court below on October 3, 1958.

This appeal is brought pursuant to Title 28, U. S. Code, Section 1254, (2). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Chicago v. Atchison, Topeka and Santa Fe Ry. Co., 357 U. S. 77,82, 2 L. Ed. 2d 1174, 78 S. Ct. 1063; *City of Detroit v. Murray Corporation*, 355 U. S. 489, 2 L. Ed. 441, 78 S. Ct. 458; *Watson v. Employers Liability Assur. Co.*, 348 U. S. 66, 70, 75 S. Ct. 166, 99 L. Ed. 74, 80; *Louisville and N. R. Co. v. Green*, 244 U. S. 522, 61 L. Ed. 1291, 37 S. Ct. 683; *Hayes v.*

Seattle, 251 U. S. 233, 64 L. Ed. 243, 40 S. Ct. 125; *St. Louis I. M. and S. R. Co. v. Hasty*, 255 U. S. 252, 65 L. Ed. 614, 41 S. Ct. 269; *Ex Parte Buder*, 271 U. S. 461, 70 L. Ed. 1036, 46 S. Ct. 557; *Moore v. Fidelity and Deposit Co.*, 272 U. S. 317, 71 L. Ed. 273, 47 S. Ct. 105.

QUESTIONS PRESENTED

In 1886 the Legislature of the State of Mississippi passed an act which Appellee contended was an offer to telephone companies of an irrevocable, perpetual, and assignable franchise to use all public streets, highways, roads and public places in the State of Mississippi, for their telephone lines without the necessity of ever having to pay compensation therefor, or any charge thereon. Appellant contends that this act was passed only for the purpose of giving telephone companies the right of eminent domain and a revocable license to use the streets, etc. In 1956 the Mississippi Legislature enacted Chapter 372 of the Mississippi Laws of 1956, which provided for a charge of two percent of local gross revenues to be paid to municipalities whose streets, etc., would be used by public utilities. Appellee, contending that its predecessors in title had accepted the alleged offer prior to the repeal of the Act of 1886, here asserts an irrevocable franchise to use, without charge, the streets, etc., in the manner in which they are now using them. They contend that Chapter 372 of the Mississippi Laws of 1956, insofar as it seeks to impose such charge, impairs the obligation of the alleged contract with their predecessors, and is, therefore, a violation of Article I, Section 10 of the Constitution.

Appellant contends that Chapter 38 of the Mississippi Laws of 1886 did not constitute an offer to contract, but was only the grant of the right of eminent domain with a

revocable license. It contends that this is shown by the wording of the Act, its history, and the actions of Appellant's predecessors. Appellant contends, further, that if a binding contract was ever executed, Appellee has exceeded its rights thereunder and, therefore, the charge can be imposed without violating the Constitution.

Appellant also contends that the procuring of a franchise by Appellee's predecessor from Appellant places them in exactly the same position as the water company involved in *Bankers Trust Company v. Raton*, 258 U. S. 328, which was held to be estopped to now claim a statewide franchise.

These questions may be enumerated as follows:

1. Does Federal Law, and particularly Constitution Article I, Section 10, render invalid the enactment of the Mississippi Legislature (Chapter 372 of the Laws of 1956) authorizing Appellant to collect a rental charge from Appellee for the use of streets, alleys and other public places for the erection and maintenance of its facilities? On this appeal, this question involves the following subordinate considerations.

a. Does Federal Law, i. e. the decisions of this Court, require the holding of the Courts below that use and occupation of highways, streets, etc., from 1886 to 1890, by Appellee's predecessors, resulted in a contract with the State whereby Appellee now has a contractual right under Chapter 38 of the Laws of 1886, to use the highways and streets without charge?

b. Is there any conflict between the decisions of this Court, exemplified by the case of *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 465, recognizing the

power of the sovereign states to exact charges from public utilities for the use of its streets, alleys, etc.: and the case of *Russell v. Sebastian*, 233 U. S. 195, and cognate decisions, denying the right of the sovereign to cancel or limit a franchise previously granted and accepted?

c. If there is no conflict between *St. Louis*, supra, and *Sebastian*, supra, did Chapter 38 of the Mississippi Laws of 1886, constitute an offer by the State to grant a perpetual franchise which could not be revoked under Constitution Article I, Section 10, which included the right to use highways and streets free of charge?

d. Did Chapter 38 of the Mississippi Laws of 1886 violate Amendment XIV of the United States Constitution by discriminating against individuals?

e. In determining the meaning, scope and effect of Chapter 38 of the Laws of 1886, will this court give controlling or persuasive effect to the contemporaneous decision of the Supreme Court of Mississippi which adopted the interpretation given 2 Mo. Rev. State. 1855 (see Appendix p. 51.) by this court in *St. Louis v. Western Union Telegraph Co.*, supra?

2. If Chapter 38, Mississippi Laws of 1886 was an offer to contract and was accepted by Appellee's predecessors:

a. Is the sovereignty of the State of Mississippi to be abrogated by implication? Specifically is the meaning of the language in the offer to be limited to its ordinary meaning or stretched to make "on, across and along" include "under". Is the meaning of the language in the offer to be further stretched to include uses not contemplated at the time and streets, etc. not occupied,

constructed, dedicated, nor even planned at that time?

b. Was such contract perpetual and assignable?

3. If Chapter 38, Mississippi Laws of 1886 resulted in a contract authorizing Appellee's predecessors to use all streets, etc. in the manner they are now being used free of charge, is Appellee now estopped to claim such free use perpetually because its predecessor failed to pay taxes on such franchise and accepted a franchise from this Appellant when its rights were challenged, which new franchise was limited in time and provided for compensation to the City?

4. If Appellee had the right to assert its claim under such alleged contract with the State of Mississippi, would it not be required to first offer to do equity by paying taxes on the property right claimed by it from the time of its inception until the filing of this action?

All of the foregoing questions relate to and arise out of the general proposition asserted by Appellee that it is immune from any charges for use of the public lands and thoroughfare dedicated to public use, and from charges for the supervision, control and regulation of such use by the State of Mississippi or any of its instrumentalities or municipalities. This immunity, as sustained by the Courts below, must arise from Chapter 38 of the Mississippi Laws of 1886, as construed under Article I, Section 10, of the Constitution of the United States.

STATEMENT OF THE CASE

Appellee brought this action for a declaratory judgment that Appellant was precluded from collecting the charges provided for in Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956, because of an alleged contract between

Appellee and the State of Mississippi giving Appellee the free use of the highways, streets, alleys and other public places within the State. This contract was alleged to have resulted from the acceptance by Appellee's predecessors of an offer by the State of Mississippi embraced in Chapter 38 of the Laws of 1886, by the erection of poles, lines, etc., after the 1886 enactment.

In its complaint, Appellee invoked jurisdiction both on the ground of diversity and that a Federal (Constitutional) question was involved. The complaint alleged that the enforcement of the 1956 legislation would deprive Appellee of its property (the easement for the use of highways; streets, etc., without charge) without due process of law; and that the exaction of such charge would be in violation of its contract with the State contrary to Article I, Section 10, of the United State Constitution.

On the issues joined, the threshold question was whether or not the Act of 1886 amounted to an offer to contract for the free easement claimed by Appellee. In this, Appellant relied upon the case of *Hodges v. Western Union*, 72 Miss. 910, 18 So. 84, 29 L. R. A. 770, following *St. Louis v. Western Union*, 149 U. S. 465; and antecedent and subsequent cases from this Court in line therewith. Appellee relied upon *Russell v. Sebastian*, 233 U. S. 195, and cognate cases.

Appellant contended in the Courts below, and contends here, that there is no conflict between these decisions; that the first line of cases establishes the right of the soverign, either directly or through its instrumentalities, to exact a charge for the use by the utility of its streets, alleys, etc.; while the second line of cases, relied on by Appellee, does

no more than reassert the rule that a franchise may be a contract, and when so established, may not be modified or forfeited by unilateral action, contrary to the terms thereof.

The facts in this case have all been stipulated and the only dispute with reference to such facts is in the conclusions to be derived therefrom. Such facts consist largely of the history of the establishment and growth of telephone companies in the State of Mississippi with specific reference to the incorporation and consolidation of the corporations which are Appellee's predecessors in title.

Such history shows that prior to 1876, telegraph companies had been given the right by Mississippi to erect their posts, etc. along streets, highways and other public places. *Mississippi Code of 1857*, Chapter 35, Article 45-49. This statute has been brought forward into the present laws of this state. Therefore, no purpose existed in 1886 to grant telegraph companies the right to use such streets and highways. However, in 1885 the Supreme Court of Mississippi held in *Southern Telegraph Co. v. A. G. S. R. R. Co.*, 1 Miss. Dec. (Hemmingway and McDonald) 489, that the right of eminent domain which had previously been given to telegraph companies by Chapter 135 of the Mississippi Laws of 1876 (see Appendix p. 39) had been repealed. At the very next session of the legislature Chapter 38 of the Mississippi Laws of 1886 was introduced in the Mississippi Senate in such form as to apply only to telegraph companies (Mississippi Senate Journal 1886, pp. 338, 339). Appellant contends that since telegraph companies already had the right to use streets and highways that the sole purpose of this statute was to re-enact said Chapter 135 and restore the right of eminent domain which the Supreme Court of the state held in the Southern Telegraph Company case the year before no longer existed. The history and language of the Act so indicate. Appellee contends that when the words "or tele-

phone company" were inserted into the bill in the course of its passage through the legislature, its purpose was converted to an offer of a irrevocable, perpetual and assignable contract to use all of the streets, highways and public places in the State of Mississippi free of charge, if telephone companies would establish their lines anywhere within the state. They contend this in spite of the fact that the governor of the state, who signed the bill without question, warned the legislature in his inauguration address about conferring such privileges on such private corporations. (Mississippi Senate Journal 1886, p. 45) The history of Appelle's predecessors in title show that both had already established telephone exchanges and lines in the State of Mississippi at the time of the passage of this act.

The pertinent provisions of Section 1 of Chapter 38 of the Mississippi Laws of 1886 are as follows:

> Be it enacted by the Legislature of the State of Mississippi, that any telegraph or telephone company, chartered or incorporated by the laws of this or any other state of the United States, shall, upon, making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad and, in case of necessity, on, under or over any private lands in this State; provided, that the post arm, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water, or with the convenience of any land owner, more than may be unavoidable."

Twelve subsequent sections of Chapter 38, Mississippi Laws of 1886, deal wholly with the right of eminent domain and proceedings to determine the "due compensation" to be paid to railroads and private owners. (The full text of this act is set out on page 28 of the Appendix hereto.)

Both the District Court and the Court of Appeals held that the passage of this act and the action of Appellee's predecessors in continuing to expand their facilities in the State of Mississippi resulted in a contract between the State and Appellee's predecessors, which was irrevocable, assignable and perpetual. They, therefore, reasoned that upon the authority of *Sebastian* and others cases cited by Appellee, any attempt to now charge Appellee for the use of streets, etc. in the State of Mississippi is a violation of Constitution Article I, Section 10. Such holding was made without reference to the case of *St. Louis v. Western Union Telegraph Company*, supra, and repudiated the holdings of the Supreme Court of Mississippi in *Hodges*, supra, decided in 1895, which followed the reasoning of this court in *St. Louis v. Western Union Telegraph Company*, sura.

Both of the Courts below, in weighing the case under Constitution Article I, Section 10, give control and effect to decisions of this Court in which statutes of other states and ordinances of other municipalities are assumed to grant franchise and in which these franchises were sought to be modified, limited or forfeited. None of these cases involved the validity of statutes laying a charge for use of such facilities. Neither was consideration given to whatever interpretation may have been placed upon the statutes granting the franchises by the local courts. Thus, the holding here under review would seem to establish a formula of Federal law for the interpretation of state statutes permitting the operation of utilities, where the meaning and effect of the

state statute is brought into question under the Contracts Clause of the Federal Constitution. Moreover, in the light of the *Hodges* case, this application of the rule is asserted by the Court below, notwithstanding it appears to result in the declaration and enforcement of a contract which the State never intended, and the grant and donation of property which the State did not intend to convey.

In 1899 in the face of the threat of continued litigation Appellee's predecessor in title applied to and was granted a franchise by The City of Meridian conferring the same rights included in the alleged grant of 1886 within the limits of The City of Meridian. This franchise was limited in time as was the franchise involved in *Bankers Trust Company v. Raton*, supra, and contained other requirements not included in the 1886 Act as well as the duty to provide compensation to the City for the use of its streets, etc. Appellant contends that by acceptance of this franchise Appellee is now estopped under the positive decision of this Court in *Bankers Trust Company v. Raton*, supra.

Chapter 38 of the Laws of 1886 was construed in 1895 by the Supreme Court of Mississippi in *Hodges, Tax Collector for the City of Meridian v. Western Union Telegraph Company*, 72 Miss. 910, 18 So. 84; 29 L. R. A. 770. This opinion is set out in the Appendix hereto on page 56. The Supreme Court of Mississippi there held that the right of the utility to occupy the public ways within the State was a revocable license, but that the City of Meridian could not thus impose and collect a charge for this use for the reason that the Legislature had not then granted such authority to its municipalities. Appellant's position is that it now has the right to collect the charge as authorized by Section 5 of Chapter 372, Laws of 1956.

In the District Court and the Court of Appeals, it was held that the pronouncement by the Supreme Court of Mississippi that the right of the utility to use streets, etc. without charge was a revocable license, was mere dictum; and that, in any event, the effect of the use and occupancy by the utilities of the streets, etc. in the State between the adoption of the Act of 1886 and the ratification of the Constitution of 1390 resulted in a contract between the State and the telephone companies then doing business within the State, for the continued and perpetual use of such streets, etc., without the exaction of any charge for this use. Both Courts ignored the fact that, in making the statement labelled "dictum", the Supreme Court of Mississippi was following the positive adjudication of this Court in *St. Louis v. Western Union Telegraph Company* 149 U. S. 465, supra, that a similar Missouri Statute granted a revocable license only. This Missouri Statute is set out on page 51 of the Appendix hereto.

The Courts below held that, as to Appellee, the above-quoted portion of Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956 was inoperative and of no effect, and that to allow Appellant to collect the charge therein authorized against Appellee would be in violation of Article 1, Section 10 of the Constitution of the United States.

Therefore, it is submitted that jurisdiction is conferred upon this Court by Title 28, U. S. Code, Section 1254 (2). Notwithstanding the restrictions placed on appeals generally, it is submitted that the federal questions involved embrace the matter of whether or not, under the controlling decisions of this Court, the use and occupation of ways within the State of Mississippi by Appellee's predecessor from the year 1886 through the year 1890 resulted in a contract between the State and the utility, any unilateral modi-

fication of which by the State would be in contravention of Article I, Section 10 of the Constitution. Moreover, the question of whether or not any such rights as claimed by Appellee survive the enactment of Section 5 (e) of Chapter 372 of the Mississippi Laws of 1956, requires the determination of the effect of the conduct of Appellee pursuant to subsequent Constitutional provisions and legislation by the State. The question here for determination is whether or not, at the present time, the State of Mississippi is without power to authorize its cities and instrumentalities to collect a charge for the use of streets, etc., from Appellee, because of the prohibition of Article I, Section 10 of the Constitution of the United States.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The holdings of the Courts below are that, as a proposition of Federal law, a contract, within the meaning of the Contracts Clause of the United States Constitution, now exists between the State of Mississippi and Appellee, under which appellant may use the properties of the State, and the State is precluded, either directly or through any of its instrumentalities or municipalities, from exacting any charge for the use made and to be made by Appellee for the carrying on of its various enterprises under its charter and franchise rights as a telephone company. This contract is held to subsist by virtue of the Constitution and laws of the United States, as a result of the provisions of Section 1 of Chapter 38 of the Mississippi Laws of 1886 (an eminent domain statute) and the use and occupation of streets, etc., by Appellee's predecessor prior to the adoption of the Mississippi Constitution of 1890.

It is obvious from Section 1 of Chapter 38 of the Laws of 1886 that this legislation was supplemental to other gen-

eral laws providing for the power of eminent domain, and the provisions of charters granted to other public service corporations (specifically, toll roads and railroads) by special acts of the Legislature. The situation in Mississippi at the time of the adoption of the Act of 1886 was no different from that which had obtained in numerous other states, the period being one of transition from special legislative grants of charter powers which, in the case of public utilities and service corporations, also conferred the right of eminent domain, as a charter power; to a system of incorporation and regulation and the authorization of condemnation proceedings by general law. Thus, while the judgment below deprives only Mississippi of its property and birthright as a sovereign state, the rationale of the Court below is subject to application to most, if not all, of the other states.

The rule announced below not only erects a barrier against Appellant in this case, but all other municipalities within the State. Not only does the rule preclude municipalities from collecting the charges provided in Chapter 372 of the Laws of 1956, but also inhibits any future and further legislation for the exercise of the proprietary rights of the State, not only as to the property situated within the territorial limits of municipalities but as to all ways throughout the State. This proprietary interest or property rights asserted by Appellee extends, not only to the highways, roads and streets existing in 1886 and coming into being prior to 1890, but applies to lands acquired and yet to be acquired by the State, its instrumentalities and all municipalities then in existence and coming into being since that time. Moreover, the land involved is not limited to the rights of way and thoroughfares, but, under the terms of the Act of 1886, extends "through any public lands of this State," whatever that may be held to mean.

As noted above, the statute in question was conceived and inspired during the transition from the complicated and unmanageable system of special charter and franchise grants by special acts; to incorporation, control and regulation under general law; which transition already had made great progress in other states, the examples of which were emulated by Mississippi. Thus, the problem confronting Mississippi is one which may well arise in a majority of other states. Since all of the states presently are engaged in the acquisition of lands for the construction and maintenance of super highways, as well as for the location of new thoroughfares and the re-location of many of long standing; whether by condemnation or purchase, these lands will become available for use by Appellee, which use increases the burden imposed upon the servient estate. There being no clear definition or formula by which the damages or value to be attributable to the use to be made by Appellee can be determined, both negotiations and judicial proceedings are fraught with such uncertainty as to make sure that inequalities in the prices or damages paid as between different private owners will be the rule, and that injustices will result, either to the sovereign and the public, or to the persons whose property is to be appropriated to public use. Moreover, under the rule announced below, Mississippi and all of the other states of the Union will be called upon to do justice to the owners of land by paying from the public funds for rights and interest in land to be held and enjoyed exclusively by Appellee in the pursuit of its business for its own profit.

The decisions below have not only deprived this political subdivision of a part of its sovereignty, but has deprived the States of Mississippi, and threatens to deprive other states, of a part of that sovereignty reserved to them by the Tenth Amendment of the Federal Constitution. This element

of sovereignty has not been held to now rest in the Federal Government, but in a private corporation. Under the rule announced, it has been surrendered to such corporation irrevocably by a legislative action which obviously intended no such result.

The rule announced also directly conflicts with the earlier decisions of this Court in *St. Louis v. Western Union Telegraph Co.*, and *Bankers Trust Co. v. Raton*, supra, and of the Court of Appeals, Sixth Circuit, in *Memphis v. Postal Telegraph and Cable Co.*, 145 Fed. 602. The opinion of the Court of Appeals below sought to resolve the conflict with the Sixth Circuit on the ground that an earlier statute had granted Memphis the right to charge for the use of its streets. However, they overlooked the decision of the case in the District Court (139 Fed. 707 at pp. 710-711) showing clearly that the original grant to the utility of the use of the streets, etc. in the State antedated any grant to the City of Memphis. Neither Court sought to distinguish *St. Louis* or *Bankers Trust Co.*, but both have in effect overruled them by implication.

While the issues and appropriate procedure did not permit the record to so demonstrate, the inclusion of Section 5 (e) in Chapter 372 of the Mississipip Laws of 1956 was an effort to alleviate a problem of long standing within the State. Since the days of the depression of 1929-33, new taxes have been devised by the State to provided for its own program and those of the counties; while limits have been imposed upon the levy and collection of ad valorem or property taxes, with the result that municipalities have been improverished, while more than adequate provision has been made for State activities. In the adoption of the 1956 legislation, the policy of centralizing control and regulation of utilities, thus re-

lieving municipalities of a great deal of their regulatory functions, was coupled with the grant of power to cities and towns to exact a fee and charge, such as could have been exacted by the State, not only for the use of properties belonging to the State and its municipalities, but for the cost of regulation itself. These charges have been upheld uniformly by this Court and the Courts of every state where they have been brought into question. Thus, Appellant submits, with deference, that this Court may find this case an appropriate one for reversal without further argument, with directions to the Courts below, that the complaint of Appellee in the District Court should be dismissed on its merits.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1254 (2), Title 28, United State Code. It is further submited that, unless this Court should see fit to reverse and remand for dismissal, this Court should reaffirm the true holdings of its former decisions reconciling any apparent conflict therein that may have led the Courts below into errors reflected by this record.

Respectfully submitted,
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CERTIFICATE

I, the undersigned Lester E. Wills, one of the attorneys for Appellant herein, hereby certify that I have served the foregoing Statement as to Jurisdiction upon Mr. Charles B. Snow, Milner Building, Jackson, Mississippi, Mr. O. Winston Cameron, Threefoot Building, Meridian, Mississippi, and Mr. John A. Boykin, Attorney, Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, by mailing to each of them a true copy of said Statement as to Jurisdiction, together with a copy of the Appendix filed therewith.

Witness my signature this the day of November, 1958.

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